91-1658

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

KENNETH BRUMFIELD,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the introduction of two inconsistent statements under oath (with no additional independent evidence) is sufficient evidence to support a conviction of knowingly making a false material declaration before a grand jury in violation of 18 U.S.C. § 1623(a)?

(2) Whether failure to advise a witness before a grand jury as to the purpose of his appearance, the area of the grand jury inquiry and that he was a target of the grand jury investigation deprives a grand jury witness of due process and constitutes prosecutorial abuse which precludes the government from instituting a criminal prosecution for violation of 18 U.S.C. § 1623(a) - knowingly making a false material declaration before a grand jury?

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THE OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction of two counts of knowingly making false material declarations before a federal grand jury in violation of 18 U.S.C. § 1623(a). The opinion held in pertinent part that the introduction into evidence of two

inconsistent statements (one before the federal grand jury and one at trial) with no other independent evidence was sufficient to sustain a conviction for knowingly making a false material declaration before a federal grand jury in violation of 18 U.S.C. § 1623(a). Additionally, the court below held that the failure of the government attorney, who questioned Petitioner before the grand jury, to advise Petitioner of the area of inquiry under consideration by the grand jury and that he was a "target" of the grand jury investigation did not constitute a denial of due process and fundamental fairness (Appendix A, 17A). Reproduced as Appendix A is the unpublished opinion of the Fifth Circuit in United States of America v. Kenneth Brumfield, No. 91-2461.

JURISDICTION

The Court of Appeals rendered its decision affirming Petitioner's convictions on January 24, 1992. A motion for rehearing was denied by the Court on February 19, 1992. This petition for certiorari was filed with the Clerk of this Court within ninety (90) days after entry of the Court of Appeals' judgment and is timely. Supreme Court Rule 12.1.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The questions presented involve the Due Process Clause of the Fifth Amendment to the United States Constitution, which reads in pertinent part as follows:

> "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, ..., without due process of law;

and the statutory provisions of 18 U.S.C. § 1623(a), which reads as follows:

> "Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

In March, 1989, four (4) semi-automatic rifles and ammunition were seized by Special Agents of Alcohol, Tobacco, and Firearms Division of the U.S. Treasury Department and Special Agents of U.S. Customs from a Mexican Federal Judicial Police Officer in Laredo, Texas. This seizure resulted in an extremely

acrimonious relationship between Kenneth Brumfield (a twenty-year Special Agent with the U.S. Customs Service and Resident Agent in Charge of the Laredo, Texas office) and the U.S. Attorney's Office for the Southern District of Texas. As a result of this seizure, the United States Attorney requested the trial judge to make the regularly empaneled grand jury a special grand jury investigating into official corruption of the U.S. Customs Service in Laredo, Texas. Subpoenas were issued for all Special Agents (including Kenneth Brumfield) of the U.S. Customs Service in Laredo to appear and bring with them voluminous documentation to the grand jury.

It was pursuant to these subpoenas that Petitioner appeared before federal grand jury on October 31, 1989. Prior to his appearance, he prepared extensively to discuss the areas

of inquiry for which he was subpoenaed to appear before the grand jury.

It appears that in August, 1989, the United States Attorney for the Southern District of Texas received an anonymous letter accusing Kenneth Brumfield of criminal conduct. As a result of this anonymous letter, an investigation was begun by Internal Affairs agents of the U.S. Customs Service.

On October 31, 1989, immediately prior to Petitioner's appearance before the grand jury, the Assistant United States Attorney advised the members of the grand jury of the Brumfield Internal Affairs investigation and stated:

> "If I call Mr. Brumfield in first, I'm going to go over everything our investigation has focused on (referring to original purpose of the official corruption investigation) since the beginning and leave this situation (referring to the anonymous accusations of wrongdoing

by Kenneth Brumfield) of the parrots to the very end"[1]

Immediately thereafter Kenneth Brumfield was called into the grand jury and after being sworn was advised of the following:

> "Q. Mr. Brumfield, I inform you that you are appearing before a federal Grand Jury here in Laredo, Texas. This Grand Jury is investigating the possible violations of federal criminal law. Do you understand that, Sir?"
>
> "A. Yes."
>
> "Q. The violations of federal criminal law that are under investigation by this Grand Jury include, but are not limited to, obstruction of justice, and conspiracy to violate the laws of the United States. Do you understand the scope of the investigation, Sir?"
>
> "A. Yes."

---

[1] The allegations in the anonymous letter referred to the alleged theft of three parrots by Charles Bass, a confidential informant of the United States Customs Service, from the U.S. Department of Agriculture station in McAllen, Texas.

The government attorney then proceeded to question Petitioner about his duties as resident agent in charge and the investigation conducted by U.S. Customs into the seizure of four (4) semi-automatic weapons on March 9, 1989. Out of the blue, and without advising Petitioner that the area of inquiry or scope of investigation was changing, the government attorney began asking Petitioner about raising parrots. The government attorney was so cryptic in his examination that it was not until much later in Petitioner's testimony that he understood what the area of questioning was all about, when he stated: "A. Oh, I know what you're talking about. You're talking about the USDA and the bird that they loaned him (referring to Charles Bass)."

At the conclusion of Petitioner's testimony on October 31, 1989, he was advised

to return on November 1, 1989. That evening, he retained counsel and upon advice of counsel he invoked his Fifth Amendment right at his November 1st appearance.

Petitioner was subpoenaed to appear as a witness in United States v Charles Bass, Cr. No. L-89-539-01 S. Petitioner testified pursuant to subpoena at the Bass trial on March 26 and 27, 1990.

On June 26, 1990, the federal grand jury returned a seven count indictment charging Petitioner with knowingly making false material declarations before the grand jury on October 31, 1989 (Counts 1-5), misprison of a felony (Count 6), and making a false material declaration at the trial of Charles Bass (Count 7).

Having waived a jury trial, Petitioner was tried by United States District Judge George Kazen on January 7 and 8, 1991. The

government's only evidence as to Counts 3 and 5 was Exhibits 1 (Petitioner's grand jury testimony), 2 and 3 (Petitioner's Bass trial testimony). The government's theory of prosecution was a comparison of Petitioners's grand jury testimony with his testimony at the Bass trial which appeared to be inconsistent.

Count 6 was dismissed by order of the trial court. The trial court found Petitioner not guilty of Counts 1, 2, 4, and 7 and found him guilty of Counts 3 and 5. Judgment of conviction on Counts 3 and 5 was entered on April 12, 1991.

Brumfield timely appealed his convictions and sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit had jurisdiction of Brumfield's appeal pursuant to 28 U.S.C. § 1291. On January 24, 1992, the Fifth Circuit affirmed Brumfield's

conviction and sentence. Brumfield's petition for rehearing was denied on February 19, 1992.

THE EVIDENCE AT THE TRIAL OF PETITIONER

The only evidence introduced by the government at Brumfield's trial for knowingly making a material false declaration before a grand jury was the grand jury testimony of Brumfield on October 31, 1989 and Brumfield's testimony at the Bass trial on March 26 and 27, 1990. No independent evidence was presented by the government to establish that declarations made by Petitioner before the grand jury were "knowingly made".

THE FIFTH CIRCUIT DECISION

On appeal to the Fifth Circuit, Brumfield contended that there was no evidence to sustain the convictions that Brumfield knowingly made a false material declaration before the grand jury. The Fifth Circuit rejected Brumfield's

contention stating:

> "Brumfield's testimony contradicted his earlier grand jury testimony and these contradictions supported the charges alleged in Counts 3 and 5. (Appendix A, 6A)
>
> * * *
>
> "The court properly inferred that Brumfield knew his statements were false when made. (Appendix A, 11A)
>
> * * *
>
> "There is sufficient evidence to support the Court's conclusion that Brumfield knew his testimony before the grand jury was false at the time it was made. It is not unreasonable for the Court to conclude that Brumfield had such detailed knowledge of the status of the parrots that he must have known he was lying when he categorically stated that he did not know what Bass had done with the parrots." (Appendix A, 13A)

Further, the Fifth Circuit's opinion rejected Petitioner's claim that the failure of the government to advise him of the area of inquiry and that he was a target of an investi-

gation constituted prosecutorial abuse of the grand jury process and was a denial of due process. (Appendix A, 18A)

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit has decided an important issue of federal criminal law which has not been settled, but should be, by this Court, namely whether a criminal defendant can be convicted of knowingly making a material false declaration before a grand jury in violation of 18 U.S.C. 1623(a) when the only evidence presented to a trier of fact is two inconsistent statements under oath. By its ruling, the Fifth Circuit has established that in 18 U.S.C. 1623(a) prosecutions the burden of proof upon the prosecution is merely the proof of two inconsistent statements and nothing more. Additionally, the Fifth Circuit has ruled that

it is not a denial of due process and prosecutorial abuse for a government attorney to fail to advise a witness before a grand jury the purpose of his appearance, the area of inquiry or that the witness is a "target" of the grand jury investigation as long as he is advised of his Fifth Amendment rights.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit's Opinion Is In Direct Conflict With United States v. Cross, A Reported Opinion Of That Court, Overrules Cross, And Has Established A New Burden of Proof in Perjury Prosecutions in Violation of the Holding in Dunn v. United States

This Court, in interpreting 18 U.S.C. § 1623, in Dunn v. United States, 442 U.S. 100, (1979), stated:

> **"But nothing in the language or legislative history of the statute suggests that Congress contemplated a relaxation of the Government's burden of proof with respect to all inconsistent statements given under oath." [at 109].**

The Fifth Circuit's opinion in the case at bar is in direct conflict with the holding of Dunn v. United States and implicitly overrules the Fifth Circuit's decision in United States v. Cross, 638 F.2d, 1375, 1378, modified on other grounds 655 F.2d 50 (5th Cir. 1981), wherein the Court stated:

> "Cross challenges the sufficiency of the evidence presented in support of the offense charged in Count 1. The essential elements of a prosecution under 18 U.S.C. § 1623 are (1) knowingly making (2) a false (3) material declaration while (4) under oath. Cross contends that there was insufficient evidence to support the conclusion that the statements he made before the grand jury concerning his conversations with the Banditos, Timken or Big Jimmy were false. **The only evidence supporting the charge that he testified falsely to the grand jury was the inconsistency of the statements Cross made to Agent Boyd with his grand jury testimony.**
>
> "Patently, one of Cross's statements was incorrect. However, the jury could not possibly determine beyond reasonable doubt from the evidence before it which one was false. While two inconsistent statements, each made while the declarant was under oath, are sufficient to support

> a charge of violating 18 U.S.C. § 1623, *see* 18 U.S.C. § 1623(c), *see, e.g., United States v. Patrick*, 542 F.2d 381 (7th Cir.), *cert. denied*, 430 U.S. 931, 77 S.Ct. 1551, 51 L.Ed.2d 775 (1976), **two inconsistent statements, only one of which is made under oath, are insufficient, without additional independent evidence, to support the conclusion that the one made before the grand jury was untrue.** There was no documentary or testimonial evidence that proved Cross had in fact discussed the attempted assassination with Timken, Big Jimmy or the Banditos. We must, therefore, reverse the conviction on Count 1 of the indictment." *[at 1378]*. [Emphasis supplied].

United States v. Cross is wholly indistinguishable from the case at bar.

The Fifth Circuit's opinion has established a new burden of proof for the government in proving a violation of 18 U.S.C. § 1623(a). The import of the panel's opinion is that all that must be done to sustain a conviction is to show a subsequent inconsistent statement to that which a defendant is charged and nothing more. The lower court's opinion runs contrary

to established substantive law and rules of evidence. As the Second Circuit in United States v. Bortnovsky, 879 F.2d 30, 33 (1989) held:

> "However, even if this testimony had conflicted directly with that given previously, the difference alone would not constitute perjury.
>
> > Presentation of a witness who recants or contradicts his prior testimony is not to be confused with . . . perjury. It was for the jury to decide whether or not to credit the witness.
>
> *United States v. Holladay*, 566 F.2d 1018, 1019 (5th Cir.) (per curiam), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). *See also United States v. Hemmer*, 729 F.2d 10, 17 (1st Cir.) (inconsistencies between witness's statements before grand jury and at trial do not warrant inference that government knowingly used false testimony), *cert. denied*, 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984); *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir.) ("Contradictory testimony does not constitute perjury.") (footnote omitted), *cert. denied*, 449 U.S. 880, 101 S.Ct.

229, 66 L.Ed.2d 104 (1980). [Emphasis supplied].

Contrary to the admonition of this Court in Dunn, the Fifth Circuit has relaxed the Government's burden of proof in perjury prosecutions. Such a result should not be countenanced by this Court.

II. The Fifth Circuit's Opinion Is In Direct Conflict With United States v. Clizer, A Ninth Circuit Case

The Fifth Circuit's opinion in the case at bar is in direct conflict with the holding of the Ninth Circuit in United States v. Clizer, 464 F.2d 121, (1972). In Clizer, appellant challenged the sufficiency of evidence upon the exact same ground as the challenge in the case at bar. The Court stated:

> "We have examined the evidence on Count III, and have concluded that it is insufficient to sustain the jury's verdict. The record contains no direct evidence that Clizer remembered the shell casing

> episode at the time he testified before the grand jury. In fact, there is little, if any, circumstantial evidence to show that Clizer must have remembered the incident. . . . The only circumstantial evidence that even tends to show that the incident must have been remembered by Clizer is testimony given by Ronald Reeser, an acquaintance of Clizer, and an active participant in NFO, who became a government informer shortly after the occurrence of the fires that were the subject of the grand jury investigation. His testimony represents too slender a reed upon which to rest the conviction on Count III. *[at 125]*. [Emphasis supplied].

The record in this case contains no direct or circumstantial evidence to show that Petitioner had remembered the facts as charged in Counts 3 and 5, "at the time he testified before the grand jury."

The Fifth Circuit's opinion in the case at bar has totally misapplied and misapprehended the holding in United States v.

Barnhart, 889 F.2d 1374, 1379 (5th Cir., 1989).

The Barnhart Court stated:

> "The jury could reasonably have concluded that Barnhart knew the falsity of his answers based upon the testimony of the two FBI agents who testified in detail about Barnhart's numerous references to the advice to "get dumb," the memorable nature of such an occurrence, the proximity of those statements to the grand jury testimony, the testimony of the agents as to Barnhart's other knowledge of the transaction under investigation and as to Barnhart's attitude toward the investigation, the testimony of the agents and the government attorney regarding Barnhart's demeanor, the transcript of the grand jury testimony, and the audio tape of the grand jury testimony. Unlike the situation in *United States v. Clizer*, 464 F.2d 121, 125 (9th Cir. 1972), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 697, 34 L.Ed.2d 673 (1972), relied on by Barnhart, there was more than marginal testimony to prove knowledge of falsity. The jury in the instant case could reasonably have found

that Barnhart knowingly testified falsely.[2] [Emphasis supplied].

In the case at bar there was no independent evidence from which the trial court or the Fifth Circuit could conclude that Petitioner knowingly testified falsely before the grand jury. Comparing two transcripts which have purportedly inconsistent statements is insufficient to convict under 18 U.S.C. § 1623(a).

As a matter of law Petitioner should have been granted a judgment of acquittal or a finding of not guilty.

III. Notions Of Due Process And Fundamental Fairness Require That A Witness In The Grand Jury Be Advised Of The Area Of Inquiry And That He Is A Target Of The Grand Jury Investigation

[2] No such evidence was presented by the prosecutor in the instant case. There wasn't even "marginal testimony to prove knowledge of falsity". There was no evidence.

From a bare reading of the grand jury testimony, it can be seen that Petitioner was never advised of the area of inquiry or that the scope of the investigation had changed from the original purpose of his appearance to his personal conduct.[3] Nor was he advised that he was a target of any investigation which is a violation of Department of Justice policy.[4]

United States v. Martellano, 675 F.2d 940 (7th Cir., 1982), in reversing a perjury conviction, is instructive on this issue.

> **The government's evidence does not show what, if anything, the defendant was informed by the grand jury about the subject of the investigation. It is common grand jury practice to preliminarily**

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[3] Petitioner raised this issue in his Motion to Dismiss. Record on Appeal, p. 124. The trial court rejected Petitioner's contention.

[4] It is interesting to note that the government contended throughout these proceedings that Petitioner was not a target. Record on Appeal, pp. 78, 154.

> **identify for the witness, at least to a limited extent, the subject matter of the inquiry.** [citation] [Emphasis supplied, at p.943]

In order for a witness to answer questions thoughtfully and truthfully, the witness should be aware of the subject matter of the inquiry[5]. This was not done in the case at bar. Such a failure together with the ambiguous nature of the questions asked of Petitioner can lead only to the conclusion that he was denied due process at the most, and at the least, he was denied fundamental fairness. The actions of the government attorney was an abuse of the grand jury process. Such chicanery and outrageous conduct of government attorneys

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[5] Equally instructive is United States v. Kehoe, 562 F.2d 65, 67 (1st Cir., 1977), where the prosecutor outlined fully to the defendant in the grand jury exactly what the grand jury was investigating. The prosecutor was not cryptic or misleading as to the area of inquiry, as in the situation in the case at bar.

should not be condoned or given the stamp of approval by this Court.[6]

The trial court erred in not suppressing Petitioner's grand jury testimony for the above-stated reasons.

IV. As A Matter Of Due Process Or In The Exercise Of This Court's Supervisory Power, The Conviction Of Petitioner Should Be Reversed Because These Charges Were The Result Of An Abuse Of The Grand Jury Process.

A review of the record in the case at bar demonstrates that the government's decision to question Petitioner without advising him he was a "target" or as to the area of inquiry in which the grand jury was investigating was a strategic ploy calculated to induce Petitioner

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[6] The Third Circuit in United States v Crocker, 568 F.2d 1049, 1056 (1977), declined to hold that a "target's" grand jury testimony should have been suppressed because "of the warnings actually given and of Crocker's knowledge of the subject of the grand jury's general investigation".

to testify without the benefit of knowing the area of inquiry. Such a tactic constitutes a fundamental abuse of the grand jury process requiring reversal of Petitioner's conviction based on that testimony under either this Court's supervisory powers or the Due Process Clause of the Fifth Amendment of the United States Constitution.

A. Standard of Review

The nature of the first question here--whether the grand jury was put to an improper purpose--requires this Court independently to review the decision below denying Petitioner's motions to dismiss and for judgment of acquittal. E.g., Pullman-Standard v. Sivin, 456 U.S. 273, 290 n.19 (1982) (collecting cases); see also United States v. Ruppel, 666 F.2d 261, 268 (5th Cir.), reh'g denied, 671 F.2d 1378 (5th Cir.), cert. denied, 458 U.S. 1107 (1982) (con-

ducting independent review to determine whether grand jury was improperly used to prepare for trial on pending indictment). This is because "[t]he questions of a grand jury's dominant purpose is not the typical question of historical fact nor even the typical inquiry as to the state of mind of a witness or a party. It is the application of a legal standard designed to ensure that the grand jury, a body operating peculiarly under court supervision, is not misused by the prosecutor." In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985, 767 F.2d 26, 29 (2d Cir. 1985) (citations omitted).

Here, a particularly searching review of the record is warranted in light of the fact that the District Court made no specific findings to support its denial of Petitioner's motions. Jurek v. Estelle, 623 F.2d 929, 932 (5th Cir. 1980), cert. denied, 450 U.S. 1001

(1981) (where duty of independent review exists and district court makes "no findings on matters crucial to the ultimate determination, [appellate court should] reach into the record and rely on undisputed facts clearly supported therein"). Indeed, it is clear that the District Court's ruling was made as a matter of law and no discussion addressed the government's conduct. [See Record on Appeal, p. 35]

Petitioner respectfully submits that a review of the record reveals an abuse of the grand jury process so fundamental as to require reversal of his conviction.

V. Summoning Petitioner Before The Grand Jury Without Advising Him He Is A Target And Not Advising Him Of The Area Of Inquiry Requires The Suppression Of His Testimony As A Matter Of Due Process Or In The Exercise Of The Courts' Supervisory Power Over The Grand Jury.

The grand jury is designed to function as both a "shield and a sword." United States v.

Cox, 342 F.2d 167, 189 (5th Cir.) (Wisdom, J. concurring), cert. denied, 391 U.S. 935 (1965). It is to be a "sword" in conducting investigations to determine whether there is a probable cause to believe a crime has been committed, United States v. Calandra, 414 U.S. 338, 343 (1974), and a "shield" in protecting against oppressive, arbitrary and discriminatory governmental conduct, United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion).

A grand jury must of course be "legally constituted." Costello v. United States, 350 U.S. 359, 363 (1956). When it is used by the prosecution solely or predominantly for a purpose other than to uncover evidence of a crime or identify persons to be charged, the grand jury has ceased to be "legally constituted" because it has ceased to function within the scope of its lawful authority. E.g., United

States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958) (prosecution "would be flouting the policy of the law" if it were "using [the] criminal procedures [of the grand jury] to elicit evidence in a civil case"); United States v. Beasley, 550 F.2d 261, 266 (5th Cir.), reh'g denied, 553 F.2d 100 (5th Cir.), cert. denied, 434 U.S. 938 (1977) (if powers of the grand jury are used, not for the purpose of criminal investigation, but rather "for the primary purpose of strengthening [the prosecution's] case on a pending indictment or as a substitute for discovery," there exists an abuse of the grand jury process warranting dismissal of the indictment); United States v. Doss, 545 F.2d 548, 552 (6th Cir. 1977) (reversing, as denial of both due process and the right to counsel, the perjury conviction of a defendant summoned to testify before a grand

jury that had already indicted him, where he had not been informed of that fact, though he was warned he was a target and given full Miranda-type warnings; grand jury proceedings under the circumstances were "void"); United States v. Fields, 475 F.Supp. 903, 905-08 (D.D.C. 1979) (dismissing indictment as an abuse of grand jury where indictment returned solely to intimidate and pressure defendant into testifying against real target of prosecution).

It is therefore a fundamental abuse of the grand jury process, implicating basic notions of fairness, for the prosecution to subpoena a witness not for the legitimate purpose of uncovering evidence of antecedent crime, but primarily for the illegitimate purpose of creating the basis for a perjury prosecution. E.g., United States v. Lardieri,

497 F.2d 317, 320-21 (3d Cir. 1974) ("the reason for having a witness testify before a grand jury is to discover the truth, not to lay the groundwork for a perjury prosecution"). Indeed, it is well-established that when the grand jury is used to create and then charge perjury, its lawful powers to investigate and indict have been so abused, and its protective function so compromised, that the witness' testimony, even if false, cannot be validly used and must be suppressed. E.g., Gershman, The "Perjury Trap," 129 U. Pa. L. Rev. 624, 629-30 n.15, 685 (1981).[7]

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[7] The overzealous prosecutor may feel the need to create perjury charges for any number of reasons, among them: to indict persons whom the prosecutor suspects of wrongdoing but against whom not enough evidence can be mustered to charge with a substantive offense, or in favor of whom the statute of limitations has run, see Brown v. United States, 245 F.2d 549, 550-51 (8th Cir. 1957) (IRS investigator suspected of impeding tax probe four years earlier); to indict persons who are about

This abuse of the grand jury has been dubbed the "perjury trap," and it indeed is conceptually related to entrapment. E.g., United States v. Remington, 208 F.2d 567, 575 (2d Cir. 1953), cert. denied, 347 U.S. 913 (1954) (L. Hand, J., dissenting) (perjury trap and entrapment doctrines share "the repugnance of decent people at allowing officials to punish a man for what they have 'incited' or

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to be charged with other, more substantive offenses to help win a conviction for those charges, see United States v. Jacobs, 531 F.2d 87 (2d Cir.), remanded for reconsideration, 429 U.S. 909 (1976), aff'd, 547 F.2d 772, 775 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978) (perjury count "essentially a strategic ploy which would make conviction on the substantive count easier if the counts were to be joined in a single trial"); or to indict persons believed to possess important information about an investigation, who the prosecutor believes must be coerced or intimidated into implicating others, cf. United States v. Chevoor, 526 F.2d 178, 179-85 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976) (victim of loansharking scheme).

'instigated'"); M. Frankel and G. Naftalis, The Grand Jury 105-06 (1977) ("[though] not technically entrapment in the strict sense of that legal term, the setting of the stage for what the prosecution hopes will be perjury is close kin to such forbidden 'creation' of crimes"). Unlike the defense of entrapment, however, which focuses on whether the defendant is predisposed to commit the crime, the perjury trap defense is premised on the notion that, regardless of the witness' predisposition, use of the grand jury to cause a witness to commit perjury is an intolerable abuse of the process.[8]

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[8] See also Gershman, The "Perjury Trap," 129 U. Pa. L. Rev. at 644, 684 (traditional entrapment defense inapplicable to crime of perjury because it is incongruous to speak of a predisposition to commit perjury, and because perjury is not the type of crime to which undercover law enforcement techniques are directed); United States v. Simone, 627 F.Supp. 1264, 1268 (D.N.J. 1986) (same).

Indeed, use of the grand jury process for the purpose of eliciting perjured testimony so implicates notions of fundamental fairness that the Supreme Court has unanimously said due process requires the reversal of a perjury conviction where it is found that the witness was manipulated into giving testimony the government knew at the time was false. United States v. Mandujano, 425 U.S. 564, 585 (Brennan and Marshall, concurring) (1976) ("prosecution for perjury [would be] a violation of the Due Process Clause of the Fifth Amendment" if the witness' "false answers were . . . induced by governmental tactics or procedures inherently unfair under all the circumstances"); id. at 609 (Stewart and Blackmun, concurring) (there are cases in which "perjury prosecution[s] must be barred because of prosecutorial conduct amounting to a denial of due process," citing

in comparison Brown v. United States, 245 F.2d 549 (8th Cir. 1957); id. at 583 (Burger, C.J., plurality) (suggesting "'entrapment' or abuse of process" would require reversal of perjury conviction on due process grounds, also citing Brown in comparison);[9] see also United States

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[9] In Brown, the Eighth Circuit dismissed a perjury conviction because it was convinced that the government had deliberately used the grand jury to elicit the defendant's false testimony so it could charge him with perjury. 245 F.2d at 555 ("[t]he purpose to get him indicted for perjury . . . is manifest"). The case involved an IRS investigator who was questioned before a grand jury about his recollection of a meeting that occurred four years earlier concerning a tax investigation into alleged official corruption in the St. Louis Collector's Office. Id. at 550-51. The grand jury was impaneled to investigate whether Brown, the defendant, and others had impeded the probe. Id. at 551. Prior to appearing before the grand jury, the government asked Brown to give an account of the meeting under oath. Id. at 555. That account differed from those of the three other participants. Id. Not unexpectedly, Brown testified before the grand jury in a manner consistent with his affidavit. He was indicted for and convicted of perjury. The Eighth Circuit,

v. Caputo, 633 F. Supp. 1479, 1486 (E.D. Pa. 1986), rev'd on other ground sub nom. United States v. Martino, 825 F.2d 754 (3d Cir. 1987) ("[a] perjury trap may violate a defendant's Fifth Amendment right to due process"); United States v. Simone, 627 F. Supp. 1264, 1269 (D.N.J. 1986) (due process violated when there is "a premeditated design on the part of the government to trap the witness into perjury in . . . an unfair way") (emphasis in original).[10]

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reversing his conviction, found that Brown was brought before the grand jury for no other apparent purpose than to repeat his false testimony. Id. The court found particularly unfair the fact that the prosecutor had asked hundreds of questions but could find only seven false denials to relatively unimportant questions that he could charge as perjury. Id.

[10] Cf. United States v. Russell, 411 U.S. 423, 431-32 (1973) (though entrapment defense usually limited to statutory elements, "outrageous" government conduct would require dismissal on due process grounds); Hampton v. United States, 425 U.S. 484, 495 (1976) (Powell, J., concurring) (due process defense available to

It is not, however, necessary to reach the constitutional question in order to bar a prosecution or reverse a conviction for perjury. Under this Court's supervisory power, which exists to preserve judicial integrity and deter governmental misconduct, United States v. Hasting, 461 U.S. 499, 505 (1983), it is enough to find that the prosecution used the grand jury process primarily to elicit perjured testimony. E.g., United States v. Whitaker, 619 F.2d 1142, 1149-50 (5th Cir. 1980) (supervisory power should be exercised to suppress false grand jury testimony if it is found that the "government was attempting to set a trap for the defendant"); United States v. Jacobs, 531 F.2d 87, 89 (2d Cir.), remanded for reconsideration, 429 U.S. 909 (1976), aff'd, 547 F.2d 772

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predisposed defendant who has been entrapped by flagrant government conduct).

(2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978) (under supervisory power, affirming reversal of perjury conviction and suppression of false grand jury testimony where, as part of plan to induce perjury, witness was not given target status warnings).[11]

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[11] See United States v. Babb, 807 F.2d 272, 277-79 (1st Cir. 1986) (supervisory power will be used when prosecutor misrepresents witness' target status in order to induce perjury); see also United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), reh'g denied, 685 F.2d 1386 (5th Cir.), cert. denied, 459 U.S. 1038 (1982) ("it is our task to see that the grand jury served its proper function in the case before us"); United States v. Thayer, 214 F. Supp. 929, 933 (D. Colo. 1963) ("[a]n indictment charging an offense which is entirely the work product of the Government cannot be upheld"), cf. United States v. Vesich, 724 F.2d 451, 460-461 (5th Cir.), reh'g denied, 726 F.2d 168 (5th Cir. 1984) (failure to warn of existence of incriminating tape not improper where witness and his attorney were told he was a target of the investigation and that voice exemplars would be requested of him).

Indeed, in Jacobs, the Second Circuit affirmed the district court's dismissal of perjury charges where the prosecutor called the defendant primarily to get her to perjure herself, and failed to tell her she was a target for the purpose of ensuring that she would not invoke her Fifth Amendment privilege against self-incrimination. Preferring not to reach the constitutional due process question that the district court found dispositive, the Court of Appeals instead affirmed twice on the basis of its supervisory power. Jacobs, 547 F.2d at 775 (second affirmance) (perjury count was "essentially a strategic ploy which would make conviction on the substantive charges easier if the counts were to be joined in a single trial").

Apparently in response to such abuses, just after certiorari was warranted in Jacobs,

the Attorney General of the United States formalized and made mandatory the Justice Department's long-standing practice of giving target warnings prior to eliciting grand jury testimony:

> A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant . . . .
>
> Although the [Supreme] Court . . . held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant[s]," the Department continues its longstanding internal practice to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of federal criminal law.

United States Attorneys' Manual--Criminal Division § 9-11.260 (1988) ("U.S. Attorney's Manual"); see Kamisar, Lafave & Israel, Basic Criminal Procedure 778 (5th ed. 1980) (target

warnings made mandatory in December 1977). Shortly after this policy was adopted, the Supreme Court gave its tacit approval to the Jacobs decision, and the mandatory policy of giving witnesses formal target warnings, when it dismissed certiorari in Jacobs as "improvidently granted." Jacobs, 436 U.S. 31 (May 1, 1978)[12].

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[12] Petitioner established through uncontradicted affidavit evidence of prominent members of the criminal defense bar of the Southern District of Texas that the office of the United States Attorney for the Southern District of Texas does not comply with regulations of the Department of Justice regarding targets or subjects of grand jury investigations. Petitioner also established that the office of the United States Attorney for the Western District of Texas does comply with such Departmental regulations. See United States v. Williams, 874 F.2d 968, 976 fn 23 (5th Cir., 1989) where this court stated:

> "We have not had called to our attention any systematic or recurring inconsistency in procedure such as concerned the Second Circuit in Jacobs."

Clearly, then, the federal courts have both the power and the duty, under the Due Process Clause of the Fifth Amendment to the United States Constitution and in their supervisory capacity, to ensure that the grand jury is used to investigate, not create, crime. Where, as here, the grand jury process has been used for the inherently improper purpose of creating a crime by summoning Petitioner for one purpose then tricking him in order to induce him to commit perjury, notions of fundamental fairness are so offended as to require suppression of that testimony and reversal of any convictions based on it. This Court should examine the opinion in United States v. Williams, 874 F.2d 968 (5th Cir., 1989) since

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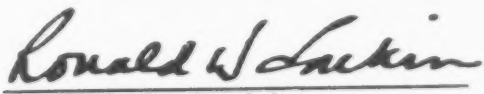
Petitioner brought this improper systematic procedure to the trial court and the issue is squarely presented in this appeal.

Petitioner has clearly shown that the United States Attorney's Office for the Southern District of Texas does systematically violate the policies of the United States Department of Justice. These violations rise to a systematic prosecutorial abuse of the grand jury process. The trial court erred in refusing to exercise its supervisory powers and suppressing the grand jury testimony of Petitioner.

CONCLUSION

For all the foregoing reasons, Petitioner, Kenneth Brumfield, respectfully suggests that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing was served this ____ day of April, 1992, on the Solicitor General, Department of Justice, Washington D.C., 20530.

Ronald W Tonkin

RONALD H. TONKIN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2461

UNITED STATES OF AMERICA

Plaintiff-Appellee,

VERSUS

KENNETH BRUMFIELD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(L-90-336)

(January 24, 1992)

Before POLITZ, Chief Judge, BROWN and SMITH, Circuit Judges. JERRY E. SMITH, Circuit Judge:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled

Kenneth Brumfield appeals his convictions of two counts of perjury. For the reasons stated below, we affirm.

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principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I. Background.

A. October 31, 1989, Grand Jury Testimony.

In 1988, Brumfield was Resident Agent in Charge of the United States Customs Office of Enforcement in Laredo, Texas. In July 1988, Charles Bass, a confidential informant hired by Brumfield, removed three parrots from the United States Department of Agriculture facilities in Mission, Texas, ostensibly to be used in undercover parrot smuggling operations. The three parrots died and in July 1989, Bass returned two of their carcasses to the Mission facility and removed three different parrots. These three parrots were subsequently seized by customs agents. Brumfield owned several parrots, some of which were bought from Bass.

On October 31, 1989, Brumfield appeared before a special grand jury investigating alleged official corruption in the Customs Service in Laredo. Brumfield initially was questioned about the seizure of four semi-automatic weapons in March 1989, but subsequently the topic of inquiry changed to that of parrots.

The following colloquy regarding the source of Brumfield's parrots became the basis of count 3 of the indictment:

> Q: These parrots that you have in your possession right now, where did you get them?
>
> A: Different places. The African Gray I purchased at a commercial outlet in San Antonio, off of North-west Military --- no, yeah, Northwest Military Highway --- no, Blanco --- excuse me, 281 North, I'll get it right in a minute, back in about '85, '84. And I purchased another one from an individual at a flea market about a year ago, and most recently I purchased two of them from an individual, and they were younger

ones. And all of them were purchased in San Antonio or the vicinity.

The prosecutor discussed Brumfield's and Bass's friendship, Bass's previous employment as a customs informant, and Bass's possession of several parrots. After discussing the manner in which Bass managed to secure the parrots from the quarantine station, the prosecutor asked the question that became the basis for count 5:

Q: Did Mr. Bass ever tell you what he did with any of these parrots that he got out there?

A: No, sir.

B. The Trial of Charlie Bass.

Bass was charged with falsely pretending to be an officer acting under the authority of the United States and with stealing and converting parrots to

his own use. Bass called Brumfield as a defense witness. Brumfield's testimony contradicted his earlier grand jury testimony, and these contradictions supported the charges alleged in counts 3 and 5.

As to count 3, Brumfield testified at Bass's trial that he never bought a "yellow head" parrot at a flea market in 1988; earlier, before the grand jury, Brumfield had stated just the opposite. As to Count 5, Brumfield testified at Bass's trial that three of the parrots obtained by Bass had died and that Bass had explained to Brumfield that he (Bass) had disposed of one of the parrots "along side of a roadway." Earlier, before the grand jury, Brumfield had stated that he was unaware of what Bass had done with any

of the parrots.

C. Brumfield's Indictment and Conviction.

Brumfield was issued a seven-count indictment: The first five counts charged him with making false statements before the grand jury in violation of 18 U.S.C. § 1623(a); count 6 charged misprision of a felony, a violation of 18 U.S.C. § 4; and count 7 charged making a false statement before the court, in violation of 18 U.S.C. § 1623(a). Brumfield proceeded to trial before the court, which found him not guilty on counts 1, 2, 4, and 7 and guilty on counts 3 and 5.[1]

II. Sufficiency of the Evidence.

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[1] Count six had been dismissed prior to trial.

To obtain a conviction for a charge of perjury under section 1623(a), the government must prove that the defendant's statements were material, that they were false, and that, at the time they were made, the defendant did not believe them to be true. United States v. Barnhart, 889 F.2d 1374, 1379 (5th Cir. 1989), cert. denied, 494 U.S. 1008 (1990) (citing United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988)). Materiality is a question of law. Evidence on the remaining issues must be viewed in the light most favorable to the government, with all reasonable inferences and credibility choices made in support of ther verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). We will affirm if "any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

A. Sufficiency as to Count 3.

The district court properly concluded that Brumfield's statements were material and false and that Brumfield knew they were false at the time he made them. The statements regarding where Brumfield acquired his parrots were material, as the grand jury was investigating possible misconduct relating to parrots in Brumfield's possession.[2]

During his grand jury testimony, Brumfield was asked, "These parrots that

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[2] This was not the original purpose of the grand jury investigation. Before Brumfield's testimony, however, the prosecutor presented the jury with an anonymous letter concerning the misconduct relating to parrots.

you have in your possession right now, where did you get them?" Brumfield responded that he had purchased the birds at a commercial outlet, at a flea market, and from an individual. Count 3 alleged that the answer given by Brumfield was false "because acquired all of his yellow head parrots from Charles Bass." Brumfield contends that during his grand jury appearance he was not specifically asked about yellow head parrots; therefore, his literally truthful response could not form the basis of a perjury charge.

Brumfield's response was not literally truthful. Brumfield acknowledged at Bass's trial that on October 31, 1989, he had four yellow head parrots at his house and that every one of these birds had been

purchased from or through Bass. At his grand jury testimony, Brumfield stated that he had three yellow head parrots, one of which was purchased from a flea market, two of which were purchased from Bass, and one African Gray, which was not purchased from Bass. The court properly inferred that Brumfield knew his statements about the origins of the parrots were false when made.

B. Sufficiency as to Count 5.

Again, the district court correctly concluded that all the elements of perjury were met. Brumfield's statement that he did not know what Bass did with the parrots was material the grand jury's investigation of whether Bass had improperly used the parrots he had acquired from the Department of Agricul-

ture.

During his grand jury appearance, Brumfield was asked, "Did Mr. Bass ever tell you what he did with any of these parrots that he got out there?" Appellant answered "No, sir." Count 5 alleges that Brumfield's response was false because "he had spoken with Charlie Bass concerning disposition of the parrots."

At Bass's trial, Brumfield detailed Bass's disposition of the parrots and related that Bass had told him what had happened to the parrots that Bass had obtained from the quarantine station. According to Brumfield, Bass told him when he was going to pick up more parrots. Brumfield conceded that Bass told him that some parrots had died and that he went to pick up some more.

Brumfield points out that he was not asked about conversations with Bass regarding disposition of the parrots. He contends that he interpreted the question as asking whether Bass had ever explained how Bass used the parrots in a law enforcement capacity. He avers that his interpretation was reasonable and that his answer was a truthful one, plainly incapable of forming the basis of a perjury charge.

Noting Brumfield's detailed explanation and description of Bass's efforts to dispose of the dead parrots, the district court dismissed Brumfield's explanation that he was confused when the question was posed before the grand jury. There is sufficient evidence to support the court's conclusion that Brumfield knew his

testimony before the grand jury was false at the time it was made. It was not unreasonable for the court to conclude that Brumfield had such detailed knowledge of the status of the parrots that he must have known he was lying when he categorically stated that he did not know what Bass had done with the parrots.

III. Fundamental Ambiguity.

Brumfield argues that the questions that formed the basis for his perjury convictions were fundamentally ambiguous. "A question is fundamentally ambiguous when it is not a phrase with a meaning about which men of ordinary intelligence could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as

testimony." United States v. Lighte, 782 F.2d 367, 375 (2d Cir. 1986); see also Nixon, 816 F.2d at 1029.

A. Count 3.

Brumfield contends that the question that forms the basis of count 3, "These parrots that you have in your possession right now, where did you get them?," was ambiguous and that his response was literally true. The question was not ambiguous, however. The prosecutor asked Brumfield about all of his parrots, and Brumfield described the origin of all of them. Brumfield's answer was not literally true and was not true under any possible interpretation of the question. He prevaricated about the origin of one of those parrots.

B. Count 5.

Brumfield contends that the question, "Did Mr. Bass ever tell you what he did with any of the parrots that he got there?," was fundamentally ambiguous because it was imprecise as to the time period and the meaning of "what he did." Brumfield argues that he thought the prosecutor's question before the grand jury dealt with the use of parrots by Bass in a law enforcement context in undercover operations.

Brumfield's contentions are spurious. First, the prosecutor had identified the date at issue earlier in the same line of inquiry. Second, "what he did" is not an ambiguous concept; it is merely a broad one. Brumfield categorically responded that Bass did not tell Brumfield what he did with the parrots. The district court

found that Brumfield's detailed statements at Bass's trial showed that Bass had talked to him extensively about the parrots. Thus, whether the objective of the prosecutor's question was to determine whether Bass had told Brumfield what he "did" with the parrots either in an official capacity or in a civilian capacity, Brumfield's response was false. If a response to a question was false as the defendant understood the question, a perjury conviction will be upheld. Lighte, 782 F.2d at 375.

IV. Prosecutorial Abuse of Process.

Brumfield argues that the government's questioning of him before the grand jury, without advising him that he was a "target" and without telling him the exact nature of the investigation, was a

"strategic ploy calculated to induce appellant to testify falsely." Such fundamental abuse of the grand jury process, Brumfield contends, merits reversal under either our supervisory powers or the Due Process Clause.[3]

We addressed this contention in United States v. Williams, 874 F.2d 968, 972-76 (5th Cir. 1989), and concluded that, as long as a witness is advised of the consequences of perjury, a prosecutor is not required to advise the witness of target status. Id. at 975. Indeed, we have upheld convictions where the defendant was falsely told he was not a target. E.g., United States v. Scrimgeour, 636 F.2d 1019, 1026 (5th Cir. Unit Unit B Feb.

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[3] Brumfield makes other related arguments that we also have considered and rejected.

1981), cert. denied, 454 U.S. 878 (1981). Brumfield was advised of the consequences of perjury and chose to perjure himself.

Brumfield also argues that the prosecutor called him as a witness in order to induce him to commit perjury. A prosecutor may call a witness he suspects will commit perjury, as long as the witness is one who, if truthful, could provide information relevant to the investigation. Williams, 874 F.2d at 975. Brumfield could, and did, provide information relevant to the investigation. It is therefore of little moment whether the prosecutor suspected Brumfield would commit perjury.

V. Recantation of Testimony.

Brumfield testified before the grand jury on October 31, 1989, and November 1,

1989. On January 2, 1990, Brumfield's counsel sent a letter to the foreman of the grand jury requesting that Brumfield reappear and correct his testimony. Brumfield was not afforded such an opportunity.

18 U.S.C. § 1623(d) sets up a bar to prosecution if

> (1) the recantation was made in the same continuous grand jury proceedings as the false statement;
>
> (2) at the time of recantation, the false statements had not substantially affected the proceedings; and
>
> (3) at the time of recantation, the falsity of the previous declaration had not become manifest.

The district court found that Brumfield did not meet any of these requirements. First, the court found that Brumfield's letter expressing his wish "to clear up

certain areas of inquiry" was not an admission of perjury. Second, the court found that Brumfield's testimony had affected the grand jury proceedings, as Bass was indicted the day after Brumfield testified.[4] Finally, the court found that the falsity of Brumfield's statements had become manifest before he offered to recant.[5] We find that the district court's findings were not clearly erroneous and

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[4] It is not relevant that this indictment was later superseded by another.

[5] The court noted that Bass was interviewed by customs investigators on October 31, 1989, the same day Brumfield testified before the grand jury. A call was placed between the residences of Bass and Brumfield that same evening. Brumfield refused to testify before the grand jury the next day, but Bass testified and was promptly indicted. Brumfield did not attempt to recant until January 2, 1990. Under these facts, the court concluded, Brumfield has not shown that, on January 2, 1990, it was not already manifest to him that his grand jury testimony was false.

that its rulings were correct as a matter of law.

AFFIRMED.